No. 18278

United States Court of Appeals For the Ninth Circuit

DALE ROSS, *Appellant*,

v.

GREAT NORTHERN RAILWAY COMPANY, a corporation, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

BRIEF OF APPELLEE

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SUBJECT INDEX

TABLE OF CASES

STATUTES

TEXTBOOKS

RULES

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BRIEF OF APPELLEE

I.

STATEMENT ON JURISDICTION

This is an appeal from a judgment in favor of appellee in the United States District Court for the Eastern District of Washington, Northern Division. The District Court had jurisdiction of the cause by virtue of Title 28, USCA Sec. 1331 and 1332.

The jurisdiction of the Court of Appeals is invoked under Title 28, USCA Sec. 1291.

Plaintiff's suit in two causes of action was based first on the Federal Employers' Liability Act (Title 45 USCA,

Sec. 51, et seq.) and, in the event that Act was not applicable, upon common law negligence (thus requiring extensive and lengthy instructions to the jury to cover both Federal Employers' Liability Act and common law). The exact negligence alleged was:

> "While the plaintiff was engaged in unfolding the tarp on top of the loaded piggyback truck trailer and in loosening wires, foreign to the tarp, so as to properly cover and secure the piggyback truck trailer, the wires unexpectedly gave way plunging plaintiff some 18 feet to a lower concrete landing . . ." (R. 27, Pre-trial order).

At the close of plaintiff's evidence, defendant's* motion to dismiss plaintiff's case, based on a challenge to the sufficiency of the evidence, was denied primarily on grounds that there was a possible but doubtful question of fact as to whether plaintiff was a railroad employee under the Federal Employers' Liability Act, to be decided by the jury. While denying the motion to dismiss, the court stated:

> "If this was unquestionably a common law negligence case, I would not have the slightest hesitancy in dismissing the case for want of proof of either negligence or proximate cause." (R. 424)

At the conclusion of the trial the jury, by special interrogatories, found that plaintiff was not an employee of defendant Great Northern Railway Company, and therefore not covered by the Federal Employers' Liability Act. The jury, in answer to other interrogatories, found in favor of plaintiff and returned a verdict in the amount of $20,000.00 (R. 35-36).

*Unless otherwise indicated, defendant in this brief refers to Great Northern Railway Company.

Following the verdict, defendant, by motion for judgment n.o.v., renewed its motion to dismiss as allowed under the rules and as specifically reserved for further consideration by the court after close of plaintiff's case (R. 425). Defendant's motion to dismiss was granted in memorandum decision by trial judge George H. Boldt, on June 18, 1962 (R. 39-41), and judgment of dismissal entered on July 5, 1962 (R. 42-44).

II.

STATEMENT OF THE CASE

On March 19, 1959, Kaiser Aluminum had a shipment of aluminum sheets to be moved from its Trentwood plant near Spokane to Seattle and Honolulu. Spokane International Railroad, as the only railway company serving Kaiser's Trentwood plant, was the originating carrier. The shipment was to move piggyback via Spokane International Railroad from Trentwood to Spokane, thence Great Northern Railway Company to Seattle.

The Spokane International Railroad had a contract with Ross Transfer Company for the handling of such trailer on flatcar movements. Under this arrangement, Ross Transfer would deliver a trailer to the shipper for loading of the aluminum, after which Ross Transfer Company would deliver the trailer to rail site and would load the trailer aboard the rail flatcar, secure it to the flatcar, and cover the load with a tarpaulin if required by the shipper.

Pursuant to this arrangement, plaintiff, Dale Ross, on March 19, 1959, delivered a trailer to Kaiser for loading of aluminum. After supervising the loading of the aluminum,

he returned with the loaded trailer to the Great Northern Railway Company tracks near its freight house at Spokane and proceeded to load the trailer upon a flatcar provided by the Great Northern. In the loading of the trailer onto the flatcar, he was assisted by employees of Ross Transfer. He was also assisted by them in securing the trailer to the flatcar and covering the load with a tarpaulin which he had procured from the Great Northern freight house. In the process of turning or unfolding the tarpaulin on top of the load of aluminum on the trailer, which was then on the flatcar, he fell and was injured.

Plaintiff had been one of the partners and owners of Ross Transfer Company until January, 1959, when the partnership, which had been incorporated, was sold to Riverside Warehouse (R. 71). Before he picked up the load of aluminum from Kaiser, plaintiff picked up a tarp to cover the load at the Great Northern warehouse in Spokane. Plaintiff was told by a Great Northern employee where the tarps were located and plaintiff selected his own tarp from the warehouse (R. 82-83). No one was able to identify the actual owner of the tarp involved in this accident because it went out on the load of aluminum after the accident. The tarps in the warehouse from which plaintiff selected the one involved here were owned by various trucking companies, as well as Great Northern Railway Company. When these tarps were returned to Spokane by railroad, they were consigned to Great Northern Agent McFarland and placed at door 11 of the Great Northern freight house, regardless of ownership (R. 237-239). According to plaintiff, the tarpaulin which he selected was no different than the other one at the

freight house. It weighed close to 200 pounds and folded was about 4 feet across, about 1½ feet high, dark green in color, massive, heavy, half-way dirty, and in a used condition (R. 84, 100). The tarp was bulky (R. 397), made of canvas and had eyelets on it, much the same as Exhibits Nos. 31 and 32. They (the tarps) were also very expensive, costing between $180.00 and $200.00 apiece (R. 198-199) and, of course, were waterproof, inasmuch as their purpose was to protect the shipment from damage by rain and the elements.

When plaintiff Ross arrived at the Great Northern piggyback loading ramp with the load of aluminum, he then backed the trailer load of aluminum onto the railroad flatcar and put the original tarp he had selected earlier in the day up on top of the load of aluminum (R. 92). Plaintiff's brother, Gerald Ross, was helping him with the tarpaulin on top of the load of aluminum. According to the testimony of Ross Transfer Company manager, Emery Wellman, the safer and more usual method of covering a piggyback load with a tarpaulin is to tie the tarpaulin down over the load before the trailer is placed on the flatcar (R. 338-340). Plaintiff Ross, however, testified that, on the evening of the accident he was in a hurry, but it would have been safer to have taken the tarp down onto the ground and folded it and refolded it, if it needed refolding (R. 163-164). In any event, plaintiff Ross was an expert in the piggyback business and did not need anyone to tell him how to do the details of his job (R. 178-179), but as far as the actual work was concerned, plaintiff Ross testified he had no good reason to be hurrying, inasmuch as he had authority to pull away and leave

the load because there were two men from Ross Transfer remaining who could have done the work and completed the job (R. 201). After plaintiff Ross and his brother Gerald had started to unroll the tarp on top of the load of aluminum, plaintiff had to get down for a moment to get the bill of lading out of the cab of the truck (R. 398-399). While plaintiff was away from the tarp for a moment, his brother found that the tarp was placed on the load the wrong way and would have to be turned. When plaintiff got back on the load, his brother told him of the problem and they started to turn the tarp. According to Gerald Ross, his brother grabbed hold of the tarp to help turn it and pulled on the tarp and fell backwards (R. 399-400).

In his testimony, plaintiff makes a great issue of the fact that the tarp gave him difficulty because, as he put it, it was folded wrong and would not properly roll out over the load. While it may be true that the tarp might have been folded wrong or had to be turned in order to be unfolded in such a manner as to cover the length of the load, it is conceded by appellant that the manner of folding of the tarp, which may or may not have been a cause of the accident, certainly is not an alleged or proper element of negligence against defendant (R. 97-100). In any event, the plaintiff and his brother left the tarpaulin partially unfolded on top of the load and proceeded to turn it in the partially unfolded condition (R. 101). It was while turning the partially unfolded tarp so that it would unfold longways over the load, that the accident happened. As correctly stated in the trial court's memorandum decision (R. 39-40).

"The only direct evidence in the record purporting to establish the proximate cause of the accident is the following entire testimony of plaintiff on that subject:

" 'A. We were in the process. I stepped across the load to the south side at that time.

" 'Q. And then what happened at that time?

" 'A. I reached down, we were pulling and stretching or moving the tarp out, and I was over the side. Tr. page 49 lines 21-25' (R. 108).

" 'Q. Going back to my question, would you describe from your recollection how that tarp felt up to the time you fell off this load?

" 'A. Well, we were having a little trouble moving, it not too much, and as I was unfolding it and turning it, it seemed to give way and I went over the side. Tr. page 50 lines 12-17' (R. 109).

" 'THE COURT: Let me put it this way, just tell us again, Mr. Ross, what you did at the time and what happened to you.

" 'A. Well, as I was moving the tarp and unfolding it, I ran into trouble, or it was holding up, and I braced myself to keep the tarp moving and unfolding, and something gave way. And I stepped back, I slipped, my hand slipped, I was over the side. I catapaulted to the ground. I did not touch the side of the car. Tr. page 54 lines 4-12' " (R. 113).

In the interest of consistency, appellee thinks the actual testimony of the other witnesses at the trial will be helpful.

1. Mr. A. M. Gerkensmeyer, warehouse foreman for Great Northern Railway Company, who is a friend and acquaintance of plaintiff, Dale Ross, visited him at his home a week or more after the accident (R. 209-210, 228). The conversation between Mr. Ross and Mr. Gerkens-

meyer at Mr. Ross' home at that time was as follows (R. 228-229):

"Q. Did you inquire about the accident?

"A. Yeah—well, I asked Mr. Ross what happened, and he told me.

"Q. What did he tell you?

"A. He said, 'Just one of those things, Dick,' he said. 'Just lost my balance.'

"Q. Did he make any mention of anything wrong with the tarp?

"A. No.

2. On the evening of the accident, Emery Wellman, Manager of Ross Transfer Company and plaintiff's supervisor, went to the hospital and talked to Mr. Ross. Testimony regarding this conversation between Mr. Wellman and plaintiff Ross at the hospital was as follows (R. 320-321):

"Q. All right. Now, referring to the accident itself, you have just stated that you saw Mr. Ross on the night of the accident, is that true?

"A. Yes.

"Q. And as a matter of fact, did you talk to him?

"A. Yes, I did.

"Q. And during that discussion didn't he state that he was careless?

"A. As I recall the conversation, he made the comment that he was in a hurry, and that he guessed he was a little careless.

"Q. And that is the language he himself used?

"A. I believe so."

3. Mr. Thomas Griffin, an employee of Ross Transfer Company, assisting plaintiff Ross and Gerald Ross in the loading at the time of the accident, testified as follows (R. 385-386):

"Q. As a matter of fact, at the time or shortly thereafter, it was your impression that he slipped or tripped on the skids of aluminum, isn't that correct?

"MR. KIMER: I object. That wasn't covered in the direct examination. I don't recall him testifying to anything about that.

"THE COURT: Well, I think you inquired about the nature of his fall and this would be in that general area. If he has any knowledge on this, I think he should be interrogated about it. Put him a question, please.

"MR. WETZEL: Will you read the question?

"(Whereupon, the previous question was read as follows: 'Q. As a matter of fact, at the time or shortly thereafter, it was your impression that he slipped or tripped on the skids of aluminum, isn't that correct?')

"A. That would be the natural impression I would have, yes.

"Q. (By Mr. Wetzel) Is that the impression you had at that time?

"A. That is right, at that time."

The same Mr. Griffin testified as follows at R. 386-387:

"Q. (By Mr. Hamblen) Mr. Griffin, you said this was an adequate tarp, I think that is the word you used, right?

"A. Yes.

"Q. Speak up.

"A. Yes, that is right."

4. Plaintiff's brother, Gerald Ross, who was within a few feet of plaintiff when the accident happened, describes the accident as follows at R. 399-400:

"A. Well, Dale got down off the load and I was working ing with the tarp and I unfolded it out.

"Q. How far more did you unfold it?

"A. I don't know, I folded it out far enough to see what we had—it was the wrong way that we had it. we would have to turn it.

"Q. Then did he get back up on there?

"A. Yes, he got back up on top of the load.

"Q. What did he do?

"A. He crossed over the load and he got—he was facing north, standing, and he grabbed ahold of the tarp and I told him when he got up on the load that we would have to turn it.

"Q. What happened?

"A. He either saw or I told him.

"Q. Then what happened?

"A. He grabbed ahold of the tarp and he pulled on the tarp, and he fell backwards.

"Q. What happened in relation to whether or not his body—what happened to him as he went backwards, you say, what happened to his body?

"A. He went—seemed to go straight back when I saw him going. I knew he was going to be hurt pretty bad, he was off balance, he was going backwards."

In further testimony about the actual accident, plaintiff's brother Gerald testified as follows at R. 405:

"Q. Now, with regard to the accident, isn't it your statement that Dale slipped or tripped and then lost his hold on the tarp, and then fell over the south

side of the load?

"A. Yes.

"Q. Was the flatcar standing still at the time?

"A. Yes.

"Q. There were no switch engines or switch crew in the vicinity?

"A. Not right at that moment, no.

"Q. Now, it was also your statement that Dale could have tripped on the edge of the crates or slipped on one of the steel bands, is that not true?

"A. Yes.

"Q. Now, you had an uneven footing on top of the load, did you not?

"A. Yes, that is right."

Plaintiff's brother then identified a photograph of trailer on flatcar (Ex. 27) as being substantially similar to the equipment involved at the time of the accident (R. 405-406). Gerald Ross also testified that after the accident he finished placing the tarp over the load and he did not recall having any difficulty placing the same tarp on the load (R. 406).

III.

ARGUMENT IN ANSWER TO APPELLANT

A. The Seventh Amendment and the F.E.L.A. Have No Application Whatsoever in the *Instant* Case at the Present State of Proceeding

Plaintiff's only basis for contending he was covered by the F.E.L.A. was that plaintiff was an employee of

one or both of the defendant railroads (R. 26-27, Pre-trial Order). The jury by its answers to interrogatories found he was not an employee of either railroad (R. 36), and any issue under the F.E.L.A. was thereby removed from the case. No error has been assigned to the jury's finding on this issue. Therefore the F.E.L.A. cases cited by appellant are not in point.

Starting at page 31 of appellant's brief, appellant cites Federal cases and cases under the F.E.L.A. The cited case of *Herron v. Southern Pacific Co.*, 283 U.S. 91, 51 S. Ct. 383, 75 L.ed. 857, holds specifically that in an action in a Federal court to recover damages for personal injuries under the circumstances there involved that the judge has the right and duty to direct a verdict for the defendant. Appellee here has no argument with that holding nor with the more general holding that where in a Federal court State and Federal law are in conflict, the State law must give way to Federal law. However, the *instant* case presents no conflict of Federal law and, in fact, as shown by the trial court's memorandum decision, it was agreed in open court at the close of the Ross case, following the jury verdict, that the case remaining was one based solely on Washington common law principles (R. 40).

At page 34 of appellant's brief he cites *Lavender v. Kurn*, 327 U.S. 645, an F.E.L.A. case resulting in an award for plaintiff based on circumstantial evidence. This portion of appellant's brief and the citation of F.E.L.A. cases touches precisely on the reason why the trial judge in the instant case permitted the case to go to the jury, because (quoting the judge directly, R. 423):

"If the evidence is sufficient to justify an inference he was an employee, then of course the Federal Employers' Liability Act would be applicable, and if the Federal Employers' Liability Act is applicable, we all know that due to the rulings, the law that the United States Supreme Court has laid down in that type of case, that the merest odor of either negligence or proximate cause is sufficient to permit the jury to speculate about it. Whether that is good, bad, or indifferent is beyond me. That is a fact, that is the state of the law.

"Since I think there may be sufficient evidence, I am not sure, but for the present purposes I am in doubt about that, and being in doubt, I propose to deny these motions, allow an exception, and reserve further consideration, as permitted under the rules, in the event that the verdict is such as to require it, and proceed to take the balance of the evidence in the case this afternoon."

The jury in the present case, by its answers to interrogatories, took the case out of the realm of the Federal Employers' Liability Act by finding that plaintiff Ross was not an employee of either railroad. If appellant wanted to dispute the jury's finding on this interrogatory, he should have made it one of the points on which appellant intends to rely on this appeal. He did not do so. It is too late now. Federal Employers' Liability Act cases should not now be considered.

At page 40 of appellant's brief, he cites a Florida Jones Act case. Appellee submits that the Jones Act, like the F.E.L.A., gives special protection and sets down specific rules and requirements of proof for cases involving employees in a particular industry. A Jones Act case is not in point or applicable in this case. The same reasoning applies to F.E.L.A. cases cited at page 42 of appellant's

brief, *Tennant v. Peoria & P.U.R. Co.*, 321 U.S. 29, 88 L.ed 520, and *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 1 L.ed.(2d) 493.

Appellant cites the case *Brady v. City of Philadelphia*, 41 A.(2d) 355, at page 357 (appellant's brief, page 42). This case is easily and thoroughly distinguishable from the Ross accident because in the words of the Pennsylvania court:

> ". . . Here the testimony presents *no plausible explanation of plaintiff's fall as an alternative to the compelling inference that she was precipitated to the sidewalk by stepping unawares upon a loose brick* . . ." (Emphasis supplied).

In the Ross case there are other plausible explanations of plaintiff's fall, all of which were expressed by plaintiff himself and other witnesses shortly after the accident. In fact, in conversation with witness Gerkensmeyer more than a week after the accident, plaintiff Ross still had not come up with any mention or notion that wires attached to the tarp had anything to do with the accident. At that time Dale Ross said he just lost his balance and made no mention of anything wrong with the tarp. On the night of the accident, he told his company's manager that he was in a hurry and guessed he was a little careless. Another of plaintiff's witnesses, Mr. Griffiin, thought plaintiff slipped or tripped on the skids of aluminum. Plaintiff's brother, Gerald Ross, stated that plaintiff slipped or tripped, then lost his hold on the tarp and fell over the side of the load. At page 8 of appellant's brief describing the accident, appellant's counsel purports to characterize the evidence as follows:

"The plaintiff braced himself to keep the tarpaulin unfolding. Something gave way inside the tarpaulin."

This, of course, is not the evidence at all, but rather appellant's counsel's version of what he would like the evidence to be.

Probably the best and most concise summary of plaintiff's description of the accident is contained in the trial court's memorandum decision (R. 39-41). In any event, the appellant's above quoted description should not go uncorrected, inasmuch as he has changed the record in an attempt to show that this accident happened and could have happened only while the tarp was being unfolded when actually the tarp had been folded wrong and was placed in an improper manner sideways on top of the load, and therefore, before it could be unfolded, it had to be moved lengthwise on the load. The record shows that plaintiff was in the process of moving the tarp and unfolding it; the record says, according to plaintiff's testimony at R. 113, that as he was *moving the tarp* and unfolding it, he ran into trouble, or it was holding up and he braced himself to keep the tarp *moving and unfolding*, and something gave way. There is no statement or even inference that something gave way inside the tarpaulin, nor is there any explanation of what, if anything, gave way. It could well have been that an edge or corner of the partly unfolded tarp, in being turned, caught on a binder or one of the metal bands holding the load of aluminum, or any one of the uneven ridges on top of the load and then came loose suddenly as plaintiff pulled on it. We submit that this latter explanation is more logical

and more compelling than the one involving three or four small wires and on which appellant bases his entire case.

While appellant relies heavily on the case of *DeYoung v. Campbell*, 51 Wn.(2d) 11, 315 P.(2d) 629 (1957), the trial court here in considering appellant's brief on defendant's motion for judgment n.o.v., held that the testimony in the *Ross* case, as a matter of law ". . . does not meet the requirements stated by the Washington State Supreme Court in *Wilson v. Northern Pacific Railway Co.*, 44 Wn. (2d) 122 (1954) or rise to the *quality and substance of the evidence before the same court in DeYoung v. Campbell*, 51 Wn.(2d) 11 (1957), *the cited decision most favorable to plaintiff.*" (R. 40) (Emphasis supplied.) The difference between the *instant* case and *DeYoung v. Campbell* is illustrated by the following statement at page 16 of the *DeYoung* case:

> "The evidence favorable to plaintiff, if believed by the jury, *reasonably excludes the possibility that the accident was the result of any cause other than contact with the street car rail. We believe that the facts are of such a nature and so related to each other that contact with the street car rail is the only conclusion that can fairly or reasonably be drawn therefrom. Berkovitch v. Luketa*, 49 Wn.(2d) 433, 434, 320 P.(2d) 211 (1956)." (Emphasis supplied.)

While, as appellant says at page 48 of his brief, the jury might find that Great Northern furnished a defective tarp to Dale Ross to cover the load, the evidence does not meet the requirement that the defective tarp as proximate cause of the accident is the only conclusion that can fairly or reasonably be drawn from the evidence. The evidence does not exclude the possibility that the accident was the

result of any cause other than a defective tarp, as required by the rule of *DeYoung v. Campbell*, 51 Wn.(2d) 11, 315 P.(2d) 629.

Appellant cites the case of *Nelson v. West Coast Dairy Co.*, 5 Wn.(2d) 284, 105 P.(2d) 76 (1940). The *Nelson* case was tried on the theory of implied warranty of fitness for consumption where plaintiff contracted undulant fever by reason of drinking milk from cows infected with Bangs disease. Under the requirements of proof set forth in the opinion, other dairy defendants were dismissed from the case. While a case on implied warranty of fitness for consumption is not in point here, we do not think appellant has met the requirements set forth in the *Nelson* case, namely,

> ". . . that a finding or verdict cannot be made to rest upon mere speculation or conjecture, and that the evidence must present something more than a mere possibility that an accident or injury may have occurred in a particular way." (page 296)

or that such evidence must show,

> ". . . that in all reasonable probability the plaintiff's injuries were the proximate result of the defendant's negligence." (page 296)

The "fire" cases cited by appellant, starting at page 53 of appellant's brief, are a separate line of authority not applicable here. It will be noticed that these cases allow recovery by plaintiff for the fire on the basis that no other active cause for the fire was shown and it appeared with reasonable certainty that the fire originated in the manner alleged by plaintiff, which was in fact the proximate cause, and that other possible causes did not have sufficient in-

herent probabilities to make them competitive in establishing the cause. *Sommer v. Yakima Motor Coach Co.*, 174 Wash. 638, 26 P.(2d) 92 (1933).

Not satisfied with the applicable law of the case, appellant cites other jurisdictions, *Betzag v. Gulf Oil Corporation*, 83 N.E.(2d) 833 (New York, 1949). While not applicable to the instant case, the *Betzag* case apparently, on its facts, was one which reasonably excluded the possibility that the accident was the result of any cause other than that complained of, and that there was only one conclusion which could be fairly or reasonably drawn from the evidence, which is certainly not the case in the Dale Ross accident.

Distinguishing the Ninth Circuit Court of Appeals case cited by appellant, *Fegles Construction Co. v. McLaughlin Construction Co.*, 205 F.(2d) 637, we find under the first headnote at page 637 and page 639 of the opinion that, "Montana law was controlling in diversity of citizenship action for damages from fire allegedly occurring in Montana." Assuming that the applicable law of Montana would be similar to Washington law applicable in the *instant* case, we think appellant Ross must still fail under the rule of the *Fegles* case because in that case (page 639) the Circuit Court stated that there was no evidence, direct or circumstantial, from which it could reasonably be inferred that the fire started from any of the possibilities suggested by defendant. In the *instant* case, other ways in which the accident happened were suggested and testified to by witnesses Gerald Ross, Thomas Griffin, Martin Gerkensmeyer, Emery Wellman and plaintiff himself. Ap-

pellee suggests that a limitation on the Appellate Court mentioned in the *Fegles* case, might well apply in the *instant* case. At page 639 the Circuit Court says:

> "When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court."

Appellee submits that the trial court handed down a well-reasoned memorandum decision in the *instant* case and that the circuit court, as indicated in the *Fegles* case, will be reluctant to substitute its deductions for those of the trial judge.

Appellant cites the case of *E. K. Wood Lumber Company v. Anderson,* 81 F.(2d) 161, as authority for appellant's position. The *Wood* case is distinguishable from the *instant* case in that there was no other reasonable explanation for the accident (a collision between a large boat and a small boat in the Columbia River). According to the evidence, there was no other large boat operating on the night of the accident (other than defendant's boat). It does not appear to appellee that the rule of the *Wood* case is in conflict with or alters the Washington rule that, in order for plaintiff to prevail, the evidence favorable to plaintiff reasonably excludes the possibility that the accident was the result of any other cause.

Appellant, starting at page 63 of his brief, through page 70, cites both federal and state court cases from a variety of jurisdictions. The case of *St. Germain v. Potlatch Lumber Co.,* 76 Wash. 109, 135 Pac. 804, is a logging-railway case involving death of railway company

brakeman, in which the accident occurred in Idaho and was decided pursuant to prevailing Idaho statute and is, therefore, not in point for our purposes here. Appellee submits that the law of Washington as set forth in *Wilson v. Northern Pacific Railway Co.*, 44 Wn.(2d) 122, 265 P.(2d) 815 (1954), and *DeYoung v. Campbell*, 51 Wn. (2d) 11, 315 P.(2d) 629 (1957), along with the other Washington cases, have sufficient well-settled law on which to decide the issue of the *instant* case.

IV.

ARGUMENT IN SUPPORT OF THE TRIAL COURT'S JUDGMENT DISMISSING PLAINTIFF'S CASE

A. Under the Evidence the Facts of This Case Cannot Support a Verdict for Plaintiff

The trial court's order granting judgment n.o.v. and granting judgment in favor of Great Northern Railway Company, and granting judgment of dismissal of this cause of action should be affirmed. This was a complex jury case involving two original defendants (Great Northern Railway Company and Spokane International Railroad Company, as well as two third-party plaintiffs and two third-party defendants). While the third-party actions were to be decided by the court, the jury, nevertheless, had the task of being present while some testimony went in on the third-party actions for the benefit of the court only, and had the difficult task of separating and segregating instructions applicable to an F.E.L.A. case and then finally to a common law negligence case when the jury decided that plaintiff was not an employee of either rail-

road entitled to benefits of the Federal Employers' Liability Act.

When the jury, by answer to special verdict on interrogatories, found that plaintiff was not an employee of either railway company (R. 36), counsel agreed that the case then became one based on Washington common law. This is reiterated in the first paragraph of the trial court's memorandum decision (R. 39) as follows:

> "Counsel agree the jury finding that plaintiff was not a railroad employee at the time of his injury leaves plaintiff's claim based solely on Washington common law principles."

The verdict of the jury, along with the jury's answer to special interrogatory No. 6, wherein the jury found that plaintiff was not an employee of defendant railroads, is precisely the situation the court referred to when it reserved further consideration of defendant's motion to dismiss, in the event the verdict is such as to require it (R. 423-424).

Appellant takes issue with the court's statement in its memorandum decision that plaintiff's testimony does not reasonably exclude the fact that heavy canvas when compactly folded is more or less stiff and subject to crinkling and catching *and several other equally probable causes of his fall* (R. 40).

While appellant takes great pains to try to prove that the court went beyond the evidence, appellant overlooks the fact that every witness who saw the tarp testified in some manner describing the tarp. Summarizing only a

portion of the description cited in appellee's statement of the case, we find that the tarp was, according to actual testimony, bulky, heavy, green in color, used, weighed about 200 pounds, cost $180 to $200, was about the same as any other tarp, had eyelets in it, was dirty and was waterproof inasmuch as its purpose was to protect the load of aluminum from rain, weather and the elements. The other, more probable causes of his fall, testified to by plaintiff's own co-workers, were as follows:

According to plaintiff himself, he simply said that, ". . . we were pulling and stretching or moving the tarp out and I was over the side." The court then asked him whether the term "went over the side" means, "you fell off," and the witness answered, "Yes" (R. 109). Later in his testimony, Mr. Ross described the fall by saying, "And I stepped back, *I slipped, my hand slipped.* I was over the side" (R. 113). (Emphasis supplied)

When witness Gerkensmeyer asked Mr. Ross how the accident happened, about a week later, Mr. Ross simply replied, "Just lost my balance," and did not make any mention of anything wrong with the tarp (R. 228-229).

The manager of Ross Transfer, Mr. Emery Wellman, testified that he went to see plaintiff at the hospital the night of the accident and plaintiff told him he was in a hurry and that he guessed he was a little careless (R. 320-321).

Mr. Thomas Griffin, an employee of Ross Transfer Company, working on the same trailer and flatcar load at the time of the accident, testified that it was his impression

that plaintiff slipped or tripped on the skids of aluminum, causing his fall (R. 385-386).

Plaintiff's own brother, Jerry Ross, who was assisting him and within a few feet of him at the time plaintiff fell, testified that his brother, Dale, slipped or tripped and then lost his hold on the tarp and that Dale could have tripped on the edge of the crates or slipped on one of the steel bands, inasmuch as the footing on the top of the load was uneven (R. 405).

These are the *several other equally probable causes of the fall,* from the actual testimony at the trial, and the testimony of the above-named witnesses is undoubtedly what Judge Boldt was referring to when he made the statement that plaintiff's testimony does not reasonably exclude this (the tarp being stiff and subject to crinkling and catching) *and several other equally probable causes of the fall.*

The evidence points strongly to the fact that plaintiff fell while plaintiff and his brother were attempting to turn the entire tarpaulin on the load, rather than while unfolding it, and that if the tarpaulin caught on anything it is more likely that it was a corner or other portion of the heavy, bulky tarpaulin which caught on an edge of the crates or one of the steel bands or one of the chain binders while in the process of being turned. The testimony of Gerald Ross indicates that the accident happened while the tarp was being turned. At R. 407-408, the testimony of Gerald Ross is as follows:

"Q. At that point, Dale got down and you continued

to unroll the tarp up to a point where you saw that it would have to be turned?

"A. Yes, sir.

"Q. And at about that point Dale came back, isn't that true?

"A. Yes, that is right.

"Q. And you said to Dale, 'We will have to turn the tarp,' or words to that effect?

"A. Yes.

"Q. You didn't at that time get instructions from anybody else as to what to do, did you?

"A. No.

"Q. You knew what to do?

"A. Yes.

"Q. You knew the tarp would have to be turned?

"A. Yes.

"Q. As a matter of fact, you had done that many times before, hadn't you?

"A. Yes.

"Q. Both singly and together?

"A. Yes.

"Q. That wasn't an unusual occurrence at all, was it?

"A. No, it wasn't unusual.

"Q. And it was simply a matter of swinging the tarp around lengthwise with the van?

"A. Yes, that is right.

"Q. And up to that time you hadn't seen any wire in any of the eyelets of the tarp?

"A. I don't remember any wire at that time.

"Q. And as a matter of fact, all you know at that point

was that Dale grabbed ahold of the tarp to help turn it and then fell?

"A. Yes."

And at R. 409 Gerald Ross testified as follows:

"Q. You and Mr. Griffin apparently turned the tarp after Dale's accident and finished?

"A. Yes, sir.

"Q. As far as you know, you didn't have any difficulty doing that?

"A. No, I don't think we did."

Plaintiff Ross confirms the above testimony at R. 108 where he described what happened immediately after he had gotten off the load to get the waybill out of the cab, as follows:

"A. I got back up on the load, and at that time my brother, Jerry, was there, he said, 'We are going to have to turn the tarp. We are going to have to turn it.'

"Q. Did you turn it?

"A. We were in the process. I stepped across the load to the south side at that time.

"Q. And then what happened at that time?

"A. I reached down, we were pulling and stretching or moving the tarp out, and I was over the side."

The trouble which appellant continually refers to in his brief appears in the testimony as follows, at R. 109:

"A. Well, we were having a little trouble moving, it not too much, and as I was unfolding it and turning it, it seemed to give way and I went over the side."

Not one of the witnesses, including plaintiff, testified that the probable or even possible cause of the accident was the wires, nor is there anything beyond sheer *speculation* as to how the wires, if any, got onto the tarp, and, furthermore, there was no testimony that wires could not be used to tie the tarp down, as well as rope, and, in fact, plaintiff's brother testified that they may have used some wires in tying down the load (R. 401). In his memorandum decision the judge merely stated in summary form a reasonable and probable conclusion from the evidence, namely, that a heavy, used, bulky, large, folded, waterproof tarp could very well catch or cause difficulty in turning or unfolding without the intervention of the small pieces of wire referred to by appellant. The judge stated that such a matter was one of common experience or common knowledge as it is called in the texts. 20 Am. Jur. §20, page 51, deals with the subject as follows:

> "Judicial notice is based upon the obvious reason of convenience and expediency, for it operates to save the time, trouble, and expense which would be lost in establishing in the ordinary way facts which do not admit of contradiction. A wide range of subjects may be judicially noticed by the court. Thus, legislative, political, historical, geographical, commercial, scientific, and artistic subjects, in addition to a wide range of matters arising in the ordinary course of nature or the general current of human affairs, are topics upon which the court will take judicial notice."

In the case of *Fahey v. Sayer,* 106 A.(2d) 513, which was an action by a babysitter against her employers for bodily injuries, plaintiff appealed from a directed verdict for the defendants, and on appeal the lower court was affirmed. The appellant had been in appellee's home as

a babysitter on three separate occasions and, in the course of the three visits had been to the second floor a number of times for the purpose of putting the appellee's children to bed. On no occasion had the appellant been told of the existence of the powder room entering into the pantry on the first floor. The record was silent as to the existence of a bathroom or bathrooms on the second floor of the appellee's residence. Appellant was injured in falling down the cellar stairs while looking for a powder room on the first floor. The trial court, in directing verdict for the defendants, took judicial notice of the existence of a bathroom on the second floor where the bedrooms were located, and of the plaintiff's knowledge thereof acquired in the course of her duties, notwithstanding the fact that the record was silent as to the existence of a bathroom or bathrooms on the second floor.

Plaintiff Ross had ample opportunity to bring in whatever testimony he wished concerning the tarp in question or tarps in general and the propensities and difficulties encountered in handling tarps on the job in question. As indicated above, there was ample testimony concerning the tarp, but we can find no case, no authority and no law which, by any stretch of the imagination, will allow appellant at this time to bring in testimony of a totally new witness (Manager, Mr. Wayne Lyon, appellant's brief, page 11), never thought of, mentioned or even heard of at the time of the trial.

Even assuming that appellant had called witness, Mr. Wayne Lyon, at the trial, and assuming Mr. Lyon's testimony (appellant's brief, pages 11 and 12) were in evi-

dence, we see nothing in this proposed testimony that would or could in any way alter the facts of the case or the trial court's conclusion and memorandum decision as claimed by appellant. Whether a court takes judicial notice is largely within the discretion of the court.

> "Whether it does so or not often depends upon the character of the case, the circumstances connected with it, and the disposition of the trial judge; in other words, the question whether this or that matter of fact will be judicially known in any particular case is *very largely discretionary with the court* . . . Therefore decisions on particular points are of little value as precedents, for time, place and circumstances must all be taken into consideration. The decisions are generally valuable as precedents only in so far as they lay down general guiding principles. But there are some cases in which the duty of the court to take judicial notice of certain facts has been stated in mandatory language." 15 R.C.L. p. 1062. (Emphasis supplied)

Plaintiff was allowed a demonstration with model railroad flatcars and a model ramp and a model trailer, as well as a small-scale model tarp (R. 96), identified and placed in evidence as Exhibit No. 32. Plaintiff demonstrated folding this small-scale tarp for the jury and the court. The jury had the benefit of the small tarp for demonstration and use, and had plaintiff's counsel wanted a full-sized tarp in the court room for further demonstration or illustration, he made no mention of it whatsoever during the trial. He made no objection regarding evidence on the tarp at the time of trial. He made no attempt to put in additional testimony, expert or otherwise, regarding the tarp, nor did he attempt to put a full-sized tarp in evidence. Plaintiff now should not be heard to com-

plain of evidence which he himself failed to produce and which, apparently, is now available and must certainly have been available at the time of the trial.

B. Under the Common Law of the State of Washington, Plaintiff's Evidence Was Not Legally Sufficient to Allow a Jury Verdict in Favor of Plaintiff to Stand

Under the common law of the State of Washington, negligence is never presumed. *Hoover v. Goss,* 2 Wn.(2d) 237, 97 P.(2d) 689. The party alleging negligence must prove that negligence existed and that the negligence was the proximate cause of the injury. *Carley v. Allen,* 31 Wn.(2d) 730, 189 P.(2d) 827. Furthermore, under the applicable law, no legitimate inference can be drawn that an accident happened a certain way by simply showing that it might have happened in that way, without further showing that it reasonably could not have happened in any other way.

A leading Washington case in which verdict in favor of plaintiff was set aside because of failure of plaintiff's proof is *Arnold v. Sanstol,* 43 Wn.(2d) 94, 260 P.(2d) 327. Plaintiff, a passenger in defendant's taxicab, brought suit for injuries resulting from a head-on collision between the taxicab and a car approaching from the opposite direction. In setting forth the law applicable in such a case, the court said, at page 98:

> "No element of discretion is involved in ruling upon this issue."

And at page 99:

". . . No legitimate inference can be drawn that an accident happened in a certain way by simply showing that it *might* have happened in that way, without further showing *that reasonably it could not have happened in any other way.* [Emphasis supplied.] The facts relied upon to establish a theory by circumstantial evidence must be of such a nature and so related to each other that it is the only conclusion that fairly or reasonably can be drawn from them. A verdict cannot be founded on mere theory or speculation. If there is nothing more tangible to proceed upon than two or more conjectural theories, under one or more of which a defendant would be liable, and under one or more of which there would be no liability upon him, a jury will not be permitted to conjecture how the accident occurred. *Gardner v. Seymour,* 27 Wn.(2d) 802, 808, 180 P.(2d) 564 (1947), and cases cited; *Carley v. Allen,* 31 Wn.(2d) 730, 737, 198 P.(2d) 827 (1948); *Stevens v. King County,* 36 Wn.(2d) 738, 747, 220 P.(2d) 318 (1950), and cases cited."

At page 100 of the *Arnold* case, the court continues:

"We cannot find any substantial evidence, or any legitimate inference from evidence, from which it can be said that the only conclusion that fairly and reasonably can be drawn is that the Swars car was driven over the center line gradually. It is impossible to determine when or in what manner Swars crossed the center line of the street. The evidence, measured by the rules we have stated, does not support a conclusion that the cab driver, even in the exercise of the highest degree of care, reasonably should have foreseen the conduct of Swars and recognized the risk, or taken precautions against it. It is necessary to conjecture in order to conclude that he was negligent, in that he failed to see and avoid Swars."

The case of *Gardner v. Seymour,* 27 Wn.(2d) 802, 180

P.(2d) 564 (1947), sets forth the requirements for proving proximate cause as follows, at page 809:

"The following statement from 9 Blashfield, Cyclopedia of Automobile Law & Practice (Part 2, Perm. ed.), 520 §6126, is quoted in *Paddock v. Tone*, 25 Wn.(2d) 940, 949, 172 P.(2d) 481:

" 'The burden of proving proximate cause is not sustained unless the proof is sufficiently strong to remove that issue from the realm of speculation by establishing facts affording a logical basis for all inferences necessary to support it,' and in the same case, we quoted the following from *Wright v. Wilson*, 64 F. Supp. 694:

" 'The burden of proof was upon the plaintiff to show not only in what the defendant was negligent but also that his negligence in that respect was the proximate or efficient cause of the accident . . .'

"We have frequently said that, if there is nothing more tangible to proceed upon than two or more conjectural theories under one or more of which a defendant would be liable and under one or more of which a plaintiff would not be entitled to recover, a jury will not be permitted to conjecture how the accident occurred. *Hansen v. Seattle Lbr. Co.*, 31 Wash. 604, 72 Pac. 457; *Armstrong v. Cosmopolis*, 32 Wash. 110, 72 Pac. 1038; *Reidhead v. Skagit Co.*, 33 Wash. 174, 73 Pac. 1118; *Whitehouse v. Bryant Lbr. & Shingle Co.*, 50 Wash. 563, 97 Pac. 751; *Chilberg v. Colcock*, 80 Wash. 392, 141 Pac. 888; *Parmelee v. Chicago, M. & St. P. R. Co., supra; Johnson v. King Co.*, 7 Wn.(2d) 111, 109 P.(2d) 307; *Home Ins. Co. v. Northern Pac. R. Co., supra* . . .

" '. . . no legitimate inference can be drawn that an accident happened in a certain way by simply showing that it might have happened in that way, *and without further showing that it could not reasonably have happened in any other way.* [Emphasis sup-

plied.] *Whitehouse v. Bryant Lbr. & Shingle Co.*, 50 Wash. 563, 97 Pac. 751.'"

See also *Gardner v. Seymounr,* 27 Wn.(2d) 802, 810, 180 P.(2d) 564 (1947).

The case of *Ruff v. Fruit Delivery Co.*, 22 Wn.(2d) 708, 157 P.(2d) 730 (1945), sets forth rules applicable to the *instant* case. The *Ruff* case was an appeal from a judgment in Superior Court for Yakima County, State of Washington, in favor of the defendants, notwithstanding the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained in an automobile collision. In affirming the judgment n.o.v. for defendants, the court said at page 720:

> "The court has, however, long since repudiated the so-called 'scintilla of evidence doctrine' and has repeatedly held that evidence sufficient to support a verdict must be substantial. *Cox v. Polson Logging Co.*, 18 Wn.(2d) 49, 138 P.(2d) 169, and the cases therein cited.
>
> "By 'substantial evidence' is meant that character of evidence which would convince an unprejudiced, thinking mind of the truth of the fact to which the evidence is directed. *Omeitt v. Department of Labor & Industries,* 21 Wn.(2d) 684, 152 P.(2d) 973.
>
> ". . . It is quite true that, in proper cases, negligence, like any other fact, may be proved by circumstantial evidence. However, when such evidence is relied upon to prove negligence, the circumstances themselves must not only be proved, but must be consistent with each other and with the main fact sought to be established, and they must with reasonable certainty lead to the conclusion for which they are adduced. When the circumstances lend equal support to inconsistent conclusions or are equally con-

sistent with contradictory hypotheses, the evidence will not be held sufficient to establish the asserted fact. 32 C. J. S. 1099, Evidence, § 1039; 20 Am. Jur. 1041, Evidence, §1189; 4 Nichols Applied Evidence, p. 3309. These rules were recognized and approved in *Prentice Packing & Storage Co. v. United Pac. Ins. Co.*, 5 Wn.(2d) 144, 106 P.(2d) 314."

It is a well-settled law that a fact in issue may be established by circumstantial evidence only if the circumstances which must themselves be proved, lead to the conclusion with reasonable certainty. The rule in Washington State is as follows:

"Although negligence, like any other fact, may be proved by circumstantial evidence, the circumstances themselves must not only be proved, but must be consistent with each other and with the main fact sought to be established, *and they must with reasonable certainty lead to the conclusion for which they are adduced; and when they lend equal support to inconsistent conclusions or are equally consistent with contradictory hypotheses, the evidence will not be held sufficient to establish the asserted fact.*" (Emphasis supplied.) *Falconer v. Safeway Stores*, 49 Wn. (2d) 478, 303 P.(2d) 294 (1956).

The Washington rule is stated in the following manner at 32 C.J.S. 1102, Evidence §1039:

". . . a conclusion is not supported by circumstantial evidence unless the facts relied on are of such a nature, and so related to each other, that no other conclusion can fairly or reasonably be drawn from them . . ."

C.J.S. cites the following cases for this last proposition: *Gardner v. Seymour*, 27 Wn.(2d) 802, 180 P.(2d) 564;

Arnold v. Sanstol, 43 Wn.(2d) 94, 260 P.(2d) 327; *State v. Berg,* 49 Wn.(2d) 86, 298 P.(2d) 519; *Berkovitch v. Luketa,* 49 Wn.(2d) 433, 302 P.(2d) 211.

C. Plaintiff Failed to Prove That Any Act or Omission on the Part of Defendant Was the Proximate Cause of the Accident and Injuries

In an ordinary tort action as here, there can be no liability for an act of negligence unless such act is the proximate cause of the injury. *Johanson v. King County,* 7 Wn.(2d) 111, 109 P.(2d) 307; *Cook v. Seidenverg,* 36 Wn.(2d) 256, 217 P.(2d) 799; *Adkisson v. Seattle,* 42 Wn. (2d) 676, 258 P.(2d) 461.

The materially contributed or substantial factor test should not be substituted, either as a definition of or a substitute for a proximate cause in determining what is actionable negligence. *Blasick v. Yakima,* 45 Wn.(2d) 309, 274 P.(2d) 122. If an event would have happened regardless of defendant's negligence, that negligence is not a proximate cause of the event. *Stoneman v. Wick Constr. Co.,* 55 Wn.(2d) 639, 349 P.(2d) 215.

Plaintiff in the *instant* case testified that there were wires through several of the eyelets in the tarpaulin. The evidence showed that the tarpaulin had eyelets for the purpose of tying it down over the load, and that either rope or wire would have to be used in these eyelets to tie the tarp onto the load. There was no evidence showing any custom or requiremnt that a tarp should be at all times, when not in use, free of either wire or rope. In fact, it appears from the testimony of Tom Griffin and Jerry Ross,

who finished tying down the load after the accident, that pieces of rope or wire found in the eyelets of the tarp might be used by them for tying the load down. The case is devoid of evidence that the wires were in any way a proximate cause of plaintiff's accident. In fact, the only explanation actually given for the accident by testimony of witnesses in evidence is that plaintiff's hand or foot slipped, or he tripped on a skid or on one of the bands on top of the load, or that he was careless. None of the persons at the scene was able to clarify or add to plaintiff's testimony regarding the cause of the accident. Even plaintiff's own brother, Gerald Ross, could only testify that he thought plaintiff slipped or tripped and then lost his hold on the tarpaulin and fell over the side of the load.

Proof must be upon evidence ". . . not speculation or conjecture, nor may it be by inference piled upon inference." *Wilson v. Northern Pac. R. Co.*, 44 Wn.(2d) 122, 265 P.(2d) 815 (1954). In reversing the verdict and judgment in the trial court for plaintiff in the *Wilson* case, the Washington State Supreme Court says at page 127 of its opinion:

> " '. . . this court has never held, nor has any other that we are aware of, that the proof of the proximate cause could be left to conjecture or speculation. See *Weckter v. Great Northern R. Co.*, 54 Wash. 203, 102 Pac. 1053, and cases cited.
> * * *
> " ' "In *Asbach v. Chicago, B. & O. Railway Co.*, 74 Iowa 250, it is said: 'A theory cannot be said to be established by circumstantial evidence, even in a civil action, unless the facts relied upon are of such a nature, and so related to each other, that it is the only conclusion that can fairly or reasonably be drawn from them. It is not sufficient that they be consistent

merely with that theory, for that may be true, and yet they may have no tendency to prove the theory. This is the well settled rule.' It seems to us that we may reasonably draw other conclusions as to the cause of this injury from the facts in evidence than those contended for by the plaintiff. 'Verdicts must have evidence to support them, and must not be founded on mere theory or supposition.' *Bothwell v. C. M. & St. P. Railway Co.*, 59 Iowa 194. A jury will not be permitted merely to conjecture how the accident occurred. *Cumberland & P. R. Co. v. State* (Md.) 20 Atl. Rep. 785. And it is said that 'in matters of proof we are not justified in inferring from mere possibilities the existence of facts.' *Baltimore & O. R. Co. v. State* (Md.), 18 Atl. Rep. 971."

" 'In discussing the rules of circumstantial evidence, Mr. Labatt, §§ 1602, 1603, 1604, says that a recovery cannot be had where the plaintiff's evidence is equally consistent with the absence as with the existence of negligence, and that the establishment of a juridical connection between the master's negligence and the injury being one of the essential prerequisites to the maintenance of the action, the burden of proving that there was such a connection rests on the plaintiff; that the action cannot be maintained if, after all the testimony is put in, it remains doubtful whether the injury resulted from the cause suggested by the master or the cause suggested by the servant. If there is nothing more tangible to proceed upon than two or more conjectural theories, it is immaterial that the theories suggested in the interest of the servant is more probable than that suggested in the interest of the master, so that the rule is laid down:

" ' "If the existing state of affairs, however dangerous, might, according to the ordinary experience of mankind, have been due to other causes than negligence for which the defendant was responsible, then it was for the plaintiff to exclude the operation of those causes by the greater weight of evidence." *Brooks v. Kinsley Iron & Machine Co.*, 202 Mass. 228, 231, 88 N.E. 711 . . .

" 'Possibility cannot be pyramided on possibility to make a chain of evidentiary circumstances. It is not a possible theory, but inference from facts reasonably ascertained, which impels. It is that conclusion to which the mind will inevitably return when it weighs the circumstances for either side, and will say, not arbitrarily, but as a result of due deliberation and a measuring of all the facts, that the proximate cause of the accident is to be found in the negligent conduct of the party charged.' *Parmalee v. Chicago, M. & St. P. R. Co.*, 92 Wash. 185, 158 Pac. 977.

" 'The test to be applied here is whether the jury could have determined that the appellants were liable as a reasonable inference from the evidence, or whether the verdict rests on conjecture. As was said in *Home Ins. Co. v. Northern Pac. R. Co.*, 18 Wn.(2d) 798, 802, 140 P.(2d) 507, 147 A.L.R. 849: . . .

" 'The following statement from 9 Blashfield, Cyclopedia of Automobile Law & Practice (Part 2, Perm. ed.) 520, §6126, is quoted in *Paddock v. Tone*, 25 Wn. (2d) 940, 949, 172 P.(2d) 481:

" ' "The burden of proving proximate cause is not sustained unless the proof is sufficiently strong to remove that issue from the realm of speculation by establishing facts affording a logical basis for all inferences necessary to support it," '

"and, in the same case, we quoted the following from *Wright v. Wilson*, 64 F. Supp. 694:

" ' "The burden of proof was upon the plaintiff to show not only in what the defendant was negligent but also that his negligence in that respect was the proximate or efficient cause of the accident . . .

" ' "It has been held many times that negligence consisting in the violation of a statutory duty by the defendant will not support a verdict unless it can be shown that such violation was the proximate cause of the injury. Nor can a plaintiff meet his burden of proving negligence merely by showing that he himself was free from contributory negligence, and that

> statement applies equally to his burden in the matter of proximate cause. In the present case, for example, the plaintiff was presumed to have been exercising due care and the jury so found but, so far as the evidence goes, he might, without any negligence on his part, have slipped or stumbled forward in front of the defendant's car or he might have been pushed or jostled by his companion, and the defendant would not have been liable for the accident.'" *Gardner v. Seymour*, 27 Wn.(2d) 802, 180 P.(2d) 564."

Even the leading case cited by plaintiff sets forth the rule that the evidence favorable to plaintiff must reasonably exclude the possibility that the accident was the result of any other cause (in that case contact with the streetcar rail). *DeYoung v. Campbell*, 51 Wn.(2d) 11, at p. 16.

CONCLUSION

We agree with appellant's closing statement that in passing on a question of law such as here involved the trial court has no discretion, and that when the plaintiff has not met his burden by a fair preponderance of the evidence, the judge must grant judgment n.o.v. Applying the applicable common law rules of negligence and proximate cause, the trial court had no alternative but to grant the defendant's motion. The trial court correctly granted the defendant's motion to dismiss and motion for judgment in favor of the defendant notwithstanding the verdict.

Plaintiff had his jury trial and there was no violation of the constitution in any of the acts of the trial court.

The order granting judgment n.o.v. and the judgment of dismissal should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Thomas J. Wetzel
Of Attorneys for Appellee